IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 90 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LAVJIBHAI SOMABHAI HARIJAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 90 of 2002

MR UA TRIVEDI for Petitioners No. 1-5

Mr B D Desai, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 20/02/2002

ORAL JUDGEMENT

This is a revision application filed by the petitioners herein, being the original accused persons in Sessions Case No.58/89 before the learned Sessions Judge,

Amreli. The petitioners herein have been facing trial for offence punishable under section 302 of IPC and other related offences. It appears that the prosecution evidence was recorded and the prosecution had advanced its arguments before the trial court. Even some of the accused persons have also advanced their arguments. At that point of time, the learned APP incharge of the prosecution submitted an application under section 311 of the Criminal Procedure Code, 1973 for permitting the prosecution to examine Dudhiben being the widow of deceased Arjanbhai as additional witness. After hearing the parties, the learned Sessions Judge was pleased to allow the said application Exh.69 by order dated 21.1.2002 and permitted the prosecution to examine the said witness as an additional witness. This order is in challenge in this revision. The petitioners have stated that when the evidence has been concluded and arguments have been advanced to a great extent, it would be unjust, illegal and improper to allow the prosecution to fill up the lacuna. Therefore, the trial court ought to have rejected application Exh.69 for permission to examine Dudhiben as an additional witness. That in that view of the matter, the order in question is illegal and deserves to be set aside. The petitioner has therefore, prayed that the present revision be allowed and the aforesaid order below application Exh.69 be set aside. I have heard the learned Advocate for the petitioner and learned APP and have gone through the papers available with this revision.

2. The facts are not in dispute. The petitioners herein face trial for offenace under section 302 of IPC and other related offences. The prosecution had led evidence and had examined witnesses. At the end of the evidence, further statements of the petitioners were recorded under section 313 of the Code. The prosecution as well as some of the accused persons had advanced arguments and at that stage, the aforesaid application Exh.69 was presented by the learned APP in charge of the prosecution for examination of the said witnesses. It seems to be the argument of the defence before the trial court that the Investigating Officer had probably not recorded statement of Dudhiben. She was a material witness in the said session trial. In fact, it was found that statement of Dudhiben was recorded on 7.5.1989 i.e on the date of offence itself, and copy of the said statement has been provided to the petitioners at the time when the present application Exh.69 was submitted by the prosecution before the trial court.

3. The prosecution also contended that for the just

decision in the matter, it was extremely necessary to examine Dudhiben as witness. Therefore, this was the contention of the prosecution before the trial court in para 4 of the said application Exh.69. It therefore, cannot be said that the prosecution has been trying to fill up lacuna, if any, in the prosecution case. Moreover, even after examination of Dudhiben, the trial court will have to record further statements of the petitioners under section 313 of the Code with a view to provide opportunity to them to explain evidence which may fall from the said witnesses. The defence will also be at liberty to examine the witnesses in support of their defence after recording evidence of Dudhiben. The petitioner will also be at liberty to argue further on the aforesaid evidence of Dudhiben after the evidence is recorded. This shows that the petitioners are going to get adequate opportunity to meet with the case of the prosecution even after examination of Dudhiben as a witness. This cannot be treated to be a new tactic for filling up lacuna in the prosecution case. The case has not been concluded and the judgment has not been pronounced. Even at appellate stage, additional evidence would not be impermissible totally. It appears that the fact that the Investigating Officer had not found it proper to place statement of Dudhiben as a witness in the charge sheet and, therefore, the learned APP was probably not aware about the fact that the statement of Dudhiben was recorded by the Investigating Police Agency. Because of this omission on the part of the Investigating Officer, above error seems to have taken place. After all there should be a fair trial. There cannot be a game of 'hide and seek' between the parties at the time of trial. Even under section 311 of the Code, it is permissible to permit additional evidence to be produced at a later stage. Therefore, merely because the stage is late, it cannot be said that the prosecution should be deprived of an opportunity to lead further evidence in the matter. In above view of the matter, it can be said that the evidence of Dudhiben was found to be necessary for the just decision in the matter. The trial court has also observed that the said witness is an important witness and, therefore, an additional opportunity should be provided to the prosecution for examining the said witness. When copy of the statement of Dudhiben recorded on 7.5.1989 has been provided to the defence, the defence is not likely to be taken by surprise. It is more so when the defence has placed so many questions to the witnesses of the prosecution about the role played by Dudhiben on the date of the incident. In that view of the matter, the order of the trial court cannot be said to be illegal, unjust and improper.

4. Learned Advocate for the petitioner has argued at length that the trial court has not recorded its finding that the examination of the witness is essential for the just decision in the matter of trial. The trial court has given so many reasons. It is not necessary that there should be a specific finding of each point and there should be a specific finding on each of the examination of witness is essential for the just decision in the matter. In fact, on going through the reasoning, it is found that the trial court actually meant that examination of the witness is essential for the just decision in the matter, then in that event, it would not be open to this court to allow the revision and set aside the order of trial court.

5. It has also been argued by the learned Advocate for the petitioners that according to the finding of the trial court, the statement of Dudhiben was not recorded. At the same time, this is an outcome of the arguments advanced on behalf of petitioners No.1 to 3 before the trial court which is apparent in para 2 of application Exh.69 before the trial court, where it has been submtited that the Investigating Officer has not recorded statement of Dudhiben. However, the admitted facts are that the Investigating Officer has recorded statement of Dudhiben and the copy of the said statement was provided to the defence at the time when the aforesaid application Exh.69 was submitted by the prosecution for permission of examination of the said witness. Therefore, the said statement seems to have been made by the trial court. This is a reflection on the basis of the said statement made in para 2 of application Exh.69. Therefore, it cannot be said that there was total non-application of mind on the part of the trial court. It has also been argued that witness Dudhiben is sought to be examined with a view to bypass the alleged infirmiteis brought on record by the defence during the course of cross-examination of the eye witnesses. Now after all we do not know what Dudhiben knows about the incident in question. There cannot be any dispute that her statement was recorded on the date of incident i.e. on 7.5.1989. In that view of the matter, it cannot be said that the prosecution has sought above permission with a view to bypass the alleged infirmities said to have occurred in the court during the investigation of the matter.

6. It has also been submitted that the case of the defence is likely to be prejudiced by examination of the said witness, since alleged infirmities will be answered during the course of the evidence of the said witness.

Again we do not know what the witness knows and what she will depose before the trial court. Any way, the statement of the witness was already recorded on the date of the incident itself and since there was some omission on the part of Investigating Officer as aforesaid, her name was not noticed by the learned APP and, therefore, it seems that the defence of the petitioners is not likely to be adversely affected on account of permission being granted for examination of the above witness. Mr Umesh Trivedi, learned Advocate for the petitioners further argued that the application for prosecution of application exh. 69 has not been supported by any statement of the Investigating Officer, that the statement of Dudhiben was omitted from being placed as witness in the charge-sheet. The Public Prosecutor is not required to get support of his application from the statement of the Investigating Officer. The fact remains that the said statement of the witness was recorded on 7.5.1989 itself. Therefore, simply because the Investigating Officer does not make any statement of fact, the position would not be different.

7. Learned Advocate for the petitioner has relied upon a decision in the case of State of Gujarat v. Chetan Himmatlal, reported in 2001 (2) GLH 19 in order to support his argument that no permission should be granted to the prosecution for recalling of the witness. It has to be considered here that in the said matter, the Court had rejected the application for recalling of the witness and that order was upheld by this Court. In the case before us, the prayer has been allowed by the trial court and that order is sought to be declared as illegal. Therefore, basically, the said case had different set of facts. Moreover, the Court had observed in the aforesaid case of State of Gujarat v. Chetan Himmatlal (supra) that in the instant case, it cannot be said that the situation has arisen ex-improviso to the isntant case, the prosecution ought to have anticipated a dispute defence. Therefore, permission was refused and that order was upheld in the aforesaid judgment.

7.1. Another decision relied upon by the learned Advocate for the petitioner is in the case of Mohanlal S Soni v. Union of India & Anr., reported in 1991 (2) GLR 973. There the Court has made the following observations:

> "Further, it is incumbent that due care should be taken by the Court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or

> by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to given an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. The very width of the section requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code."

7.2. The third and last decision can be gathered from the case of Rajendra Prasad v. Narcotic Cell, reported in AIR 1999 SC 2292. There the Hon'ble Supreme Court has clearly laid down that re-examination of prosecution witness cannot be permitted merely for filling up lacuna in prosecution evidence. At the same time, it has also been observed that mistakes or laches in conducting case by Public Prosecutor cannot be understood to mean lacuna in prosecution case. It has also been observed that lacuna in the prosecution case must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna and no party in a trial can be foreclosed from correcting errors. It has also been observed that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. It has also been observed that after all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

8. Even considering the aforesaid three decisions, I am of the opinion that in the present case, the name of the witness and statement of the witness in question was not placed in the charge sheet and there was some error on the part of the Investigating Officer in charge of the investigation and, therefore, there was a late application for the examination of Dudhiben as additional witness. In that view of the matter, it cannot be said that the prosecution wants to fill up lacuna in its case. In the facts and circumstances of the case, the aforesaid authorities do not fully support the present petitioner.

9. After all, this is a revisional jurisdiction and

the powers, function and jurisdiction of this Court exercising revisional jurisdiction are very limited and it would not be open to this Court to lightly set aside the orders of the trial court. This Court, should interfere with the said orders only if it is found that the order is totally illegal, perverse and unjust. It seems that the trial court has applied its mind for the permission granted for the examination of the said witness. There is no reason to interfere with the said order of the trial court. In that view of the matter, there is no merit in the present revision and it is dismissed at the admission stage.

20.2.2002 [D P Buch, J.]
msp